IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL APPEAL NO. 4 OF 2004

Mr. Ganpat Singh,
Son of Shri Kalyan Singh,
of full age, Indian National,
Resident of Durgabhat,
Ponda, Goa, native of Dahipada,
Jodhpur, Rajasthan.
Presently in the Central Jail, At
Aguada, Goa. ... Appellant/Original Accused

versus

State of Goa,
represented by Public Prosecutor. ... Respondent/Original Complainant

Mr. G. Kanekar, Advocate for the Appellant/Original Accused.

Mr. S. N. Sardessai, Public Prosecutor for the Respondent/Original Complainant.

CORAM : N. A. BRITTO, J.

DATE : 20TH AUGUST, 2004.

ORAL JUDGMENT

The Appellant herein challenges the conviction and sentence imposed upon him by the learned Special Judge, Narcotic Drugs and

Psychotropic Substances Court, Mapusa, vide Judgment and Order dated 17/25th November, 2003.

2. The case of the prosecution against the Accused was that on 20th November, 2000, at about 00.20 hours, the Accused was found near the football ground at Baga in illegal possession of 2 kgs. of Opium.

3. The Accused was charged and tried by the learned Special Judge under Section 18 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (Act for short). In the trial of the Accused, prosecution had examined 7 witnesses including P.W.5, Rajesh Kumar, P.S.I. who had conducted the said raid.

4. At the time of hearing of this Appeal, three points have been raised by Mr. G. Kanekar, learned Counsel of the Accused, points which were earlier raised and dealt with by the learned Special Judge of the Narcotic Drugs and Psychotropic Substances Court, Mapusa.

5. The first point raised by Mr. Kanekar, learned Counsel is that there was no sufficient compliance of the provisions of Section 50 of the Act, which, inter alia, provides that when an Officer who is duly authorised and who is about to search any person if required by such person, takes such person without unnecessary delay to the nearest Gazetted Officer of any of the

Departments mentioned in Section 42 of the Act or to the nearest Magistrate and when a requisition is made by such person the Officer is required to detain the person until he can bring such person before the Gazetted Officer or the Magistrate referred to in sub-section 1. In this context, P.W.5, Rajesh Kumar, P.S.I. clearly stated that he had informed the Accused of his right to be searched before a Magistrate or a Gazetted Officer but he declined the offer. P.W.5, Rajesh Kumar, had also stated that he had informed the Accused of his right to take search of the members of the raiding party including panchas which he had declined. The said version of P.W.5, Rajesh Kumar, was sufficiently corroborated by P.W.4, Rajesh Phaldessai, who had stated that P.W.5, Rajesh Kumar, P.S.I. had informed the Accused that his search could be taken in the presence of a Gazetted Officer or a Magistrate and the Accused had told P.W.5, Rajesh Kumar, P.S.I. that he could take the search and also the bag carried by him. Likewise, P.W.5, Rajesh Kumar, .P.S.I had further stated that he had also made an offer to the Accused to take his personal search which he had declined. It is but obvious that the version of P.W.5, Rajesh Kumar, .P.S.I was sufficiently corroborated by the independent panch witness P.W.4, Rajesh Phaldessai. The prosecution had also examined the other panch witness namely P.W.3, John D'Souza.

6. It is the contention of Mr. Kanekar, that P.W.3, John D'Souza, does not corroborate the version of P.W.5, Rajesh Kumar, .P.S.I and P.W.4, Rajesh Phaldessai. However, this contention cannot be accepted. P.W.3, John D'Souza, might have not been able to reproduce the exact words in which P.W.5, Rajesh Kumar, P.S.I. had made the said offers to the Accused but P.W.3, John

D'Souza has stated that P.W.5, Rajesh Kumar, P.S.I. had made an offer to the Accused that he could be searched before a superior Officer like a Judge or a Divisional Officer which he could not correctly recall but he was categorical in stating that the Accused declined the offer to be searched before a superior Officer like a Judge as well as the offer to search the members of the raiding party. The learned Judge has considered this aspect of the case and has come to the conclusion that the provisions of Section 50 of the Act were materially complied with and considering the evidence on record, I have no reason to differ from the said view held by the learned Special Judge. The evidence on record certainly justifies the conclusion that Section 50 of the Act was substantially complied with.

7. The second submission of Mr. Kanekar, learned Counsel is that the seals used for the sealing of the said samples were not deposited with the Station House Officer. In my opinion, this contention also cannot be accepted in the light of the overall evidence produced on record by the prosecution and particularly on this aspect. P.W.5, Rajesh Kumar, P.S.I. in his evidence stated that he had handed over the seals to the P.I. of Calangute Police Station vide letter at Exh.43 dated 20th November, 2001, the contents of which confirms that not only the seals but what was attached and seized from the Accused was deposited with the Police Inspector of Calangute Police. P.W.7, Umesh Shet, has confirmed the receipt of the said letter Exh.43 and has further stated that he had made an entry in the muddemal register regarding the receipt of the said articles.

8. In the light of the facts proved in this case, the reliance placed by Mr. Kanekar, learned Counsel on the unreported decision of this Court in the case of **Mr. Raj Kumar @ Raj Auchok** v. **The State** (Criminal Appeal No. 50 of 2001) dated 20th June, 2003, appears to be totally misplaced.

9. The case of **Mr. Raj Kumar Raj Auchok** v. **The State(supra)** was decided on the basis of the observations made earlier in the case of **Koyappakalathil Ahamed Koya** v. **A. S. Menon and another*(2002** *Cri.L.J. 4502.*

10. The case of **Mr. Raj Kumar @ Raj Auchok** v. **The State** (supra) was a case where there was no evidence at all to show that the seals which had been affixed to the sealed property had been deposited with P.W.4, P.S.I. Chodankar and in his evidence, P.W.4, Chodankar also had made no reference at all to the deposit of the said seals either with the P.I. of the Police Station or with P.W.6, Ganapati.

11. The observations made in the said two cases of **Koyappakalathil Ahamed Koya** v. **A. S. Menon and another**(supra) as well as **Mr. Raj Kumar @ Raj Auchok v. The State(supra) are certainly not applicable to the case at hand. In fact, both the said cases were rightly distinguished by the learned Special Judge of the Narcotic Drugs and Psychotropic Substances Court.**

12. The third point raised by Mr. Kanekar, learned Counsel is that the Accused who suffers from HIV may be released considering the imprisonment already undergone by him. It faintly appears that the learned Judge has conceded the aspect of the case that the Accused was suffering from HIV in imposing upon the Accused a sentence only of three years. The Accused was found with about two kilos of Opium which is more than small quantity and less than commercial quantity and the punishment provided in such a case under Section 18(c) is Rigorous Imprisonment which may extend to ten years and fine which may extend to Rupees One Lakh. The learned Judge has imposed fine of Rs.50,000/- and in default has ordered the Accused to undergo Simple Imprisonment for a term of six months. Considering the nature of the offence committed by the Accused, and the punishment prescribed for the same, in my opinion, there is no further scope of reducing the sentence from three years. The appropriate treatment could certainly be provided to the Accused by the Jail Authorities while he is undergoing the sentence of imprisonment considering that the Accused suffers from HIV.

13. In view of the above, I find there is no merit in this Appeal and consequently the same is hereby dismissed..

14. The Accused to surrender before the Narcotic Drugs and Psychotropic Substances Court, Mapusa, forthwith to undergo the sentence

imposed upon him.

N. A. BRITTO, J.

RD.